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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1993

DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK AND JAMES W. WETZLER, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

MILHELM ATTEA & BROS. INC., a/k/a MILHELM ATTEA & BROTHERS, INC., a/k/a MILHEM ATTEA & BROTHERS, INC.,

Respondent.

JAMES W. WETZLER, as Commissioner of Taxation and Finance of the State of New York; THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK and the TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK,

Petitioners,

v.

ELIAS H. ATTEA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF THE STATES OF WASHINGTON, ARIZONA, CALIFORNIA, FLORIDA, IOWA, MONTANA, NEVADA, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH DAKOTA, UTAH, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, to prevent the avoidance of state cigarette taxes by non-Indian consumers, the State of New York may limit the number of tax exempt cigarettes that suppliers may provide to tribal retailers on the reservation to an amount no greater than the quantity tribal members might legitimately consume and also impose upon such suppliers reasonable record-keeping and reporting requirements.

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INTEREST OF THE AMICI

Washington and the other named states submit this brief as *amicus curiae* in support of the petitioner, New York, which seeks the reversal of the judgment of the Court of Appeals of the State of New York. This brief is submitted on behalf of Washington, Arizona, California, Florida, Iowa, Montana, Nevada, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, and Wisconsin by their attorneys general. Accordingly, consent to its filing is not required. SUP. CT. R. 37.5.

The issue before the Court is whether New York may apply its cigarette tax regulations to minimize evasion of those taxes, which decisions of this Court have allowed New York and other states to collect, without the preemption of such regulations by federal statute.

The *amici* are states within whose borders are found many of the nation's Indian reservations and other geographical areas constituting Indian country. Tribes or their licensees carry on significant commercial sales activities in Indian country, marketing cigarettes to non-members as well as to tribal members in Indian country.[1] This commodity and other products sold in Indian country, such as motor vehicle fuel and liquor, represent merchandise on which states have traditionally imposed excise taxes significantly exceeding any general sales tax.[2]

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[1]Non-members of the tribe on whose reservation cigarettes are sold, like non-Indians, are subject to the state tax. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 160-61 (1980) (hereinafter *Colville*). The distinction between tribal members and non-members is maintained throughout this Argument.

[2]The current rate for Washington's cigarette tax, for example, is $5.40 per carton (200 cigarettes). The State's general sales tax rate of 6.5% would produce a tax of $1.15 based upon a median price of $17.70 per carton currently found in the market.

The states have customarily provided for the prepayment of the levies from the wholesaler or other supplier or have made other provision for passing the economic burden to the ultimate consumer where the legal incidence of the tax is otherwise on the supplier of the product.[3] Precisely such prepayment requirement, a nondiscriminatory feature of the states' tax systems, has been invalidated by the Court of Appeals.

If allowed to stand, the decision of the Court of Appeals would dismantle compliance systems such as New York's and facilitate widespread tax evasion. Non-members are attracted to Indian country by the prospect of significantly lower prices on cigarettes and other products, created by the failure to collect the state tax. Retailers in Indian country resist collecting the tax; the market for these commodities does not otherwise exist. The proximity of many reservations to large population centers encourages non-member travel to these sites.[4]

Economic factors magnify the urgency of the collection problem confronting the states. Excise taxes placed on cig-

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[3]New York places the ultimate incidence and liability for its tax upon the consumer. Pet.App.11. Washington imposes its tax at the time and place of the first taxable event occurring in the state, which would include possession or handling by a licensed distributor. Wash. Rev. Code § 82.24.080. Under Washington's system, where the legal incidence of the tax in fact falls will depend upon the fact pattern in each specific case. *See Colville*, 447 U.S. at 142, n.9 for an explanation of the Washington system. This difference between the New York and Washington systems, however, is of no legal significance in the case at bar.

[4]The Agua Caliente Reservation in California includes a substantial portion of the city of Palm Springs. The Puyallup Reservation in Washington is located, in part, within one of the state's largest cities, Tacoma. Albuquerque, New Mexico is bordered on the north by the Sandia Reservation and on the south by the Isleta Reservation.

arettes and motor vehicle fuel fund crucial state programs.[5] The sharp increase in development of gambling casinos and other gaming activities in Indian country bring the prospect of increased markets for sales of cigarettes, motor vehicle fuel, and liquor to non-member consumers frequenting these venues.[6] Taken together these considerations render the position of the Court of Appeals far more than an isolated aberration. Both the result and the reasoning of the decision seriously concern the states.[7]

INTRODUCTION AND SUMMARY

1. In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), the Court established a narrow but important exception to the general rule that state laws, including state tax laws, do not apply to Indians when on their own reservation. Under that exception, states may impose upon tribal members who make on-reservation sales to non-members the legal obligation to collect and remit to the state a tax imposed upon those non-member customers. Stated otherwise, the members have no right under federal

[5]State gasoline taxes will continue to be a primary source of funding for critically needed repairs and additions to the highway and bridge infrastructure. Earlier in 1993 the Washington legislature increased the state's cigarette excise tax from $3.40 to $5.40 per carton to partially fund a major health care measure. 1993 Wash. Laws, ch. 492, § 307. Proprosals before Congress for federal health care legislation contemplate increases in the current federal cigarette excise tax.

[6]The market share of Class III Indian games and casino gambling, as reported for 1992, more than tripled from its level in the previous year. *International Gaming & Wagering Business*, 18 (September 1993).

[7]In addition to the direct impact upon the states' own regulatory systems, the decision of the Court of Appeals may frustrate prosecutions under the federal contraband cigarette statutes conducted by the United States as an aid to state tax enforcement efforts. *See* 18 U.S.C. § 2342. There is already one reported instance where the New York court's decision has been raised as a defense to indictments brought under this federal statute. *United States of America v. Feist, et al.*, CR 92-42-M-CCL (D. Mont.).

law to "market an exemption" to their non-member customers, and to thereby frustrate the states' efforts to collect taxes validly imposed upon those customers. *Colville*, 447 U.S. at 155.

This does not mean, however, that "anything goes" in the states' efforts to collect their taxes. In decisions after *Moe*, the Court has attempted to strike a balance, which accommodates both the states' interest in collecting their legitimate taxes and the tribal members' interest in on-reservation immunity from state law. Specifically, the Court has shown in those decisions a concern about the possibility of state tax collectors coming onto reservations and seizing member owned property there. And this concern has implied a preference, also shown in those decisions, for enforcement mechanisms which operate outside the reservation and which focus upon the non-member supplier rather than the tribal retailer.

2. The New York system invalidated by the Court of Appeals is, ironically enough, exactly the sort of enforcement system explicitly preferred by this Court. It is directed to the supplier, and largely to what the supplier does outside the reservation. By invalidating that system, the Court of Appeals completely upsets the balance this Court has been attempting to strike. It upsets the balance by attributing to Congress an intent, which it finds in the Indian trader statutes, 25 U.S.C. §§ 261-264, to prohibit states from utilizing just those types of enforcement mechanisms which best accommodate the tribal interest by minimizing interference from state law. Such a result would be unfortunate, for it would force the states—and ultimately this Court—to consider the more intrusive enforcement mechanisms which the states have sought to avoid.

3. Such a result is also legally unsupportable, as an examination of the Indian trader statutes and proper preemption principles will show. The preemption analysis by the Court of Appeals was wooden and mechanical. Seizing upon

statements by this Court in other contexts that the federal regulatory system under the Indian trader statutes should be regarded as "comprehensive," the court uncritically applied what it felt to be the controlling principle to hold that any and all burdens imposed by the state on the supplier were automatically preempted by federal law.

The court overlooked, however, two fundamental points. First, under proper preemption analysis, the tribal interests embodied in the relevant federal statutes must be identified, and then weighed in balance with the competing interests of the state. (*See e.g., Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176-77 (1989); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980)). Second, the relevant statutes here, the Indian trader statutes, have been enacted to protect the interests of tribes and their members; any protection afforded the traders themselves derives from, and is purely ancillary to, the protection afforded those tribal interests. (*See e.g.*, 25 U.S.C. § 262, authorizing the Commissioner of Indian Affairs to permit persons to trade with Indians "under such rules and regulations as [he] . . . may prescribe for the protection of said Indians.")

4. What, then, is the purpose and scope of that protection? The purpose is to protect Indian customers from economic exploitation. As applied by this Court in the context of state taxes upon the Indian traders themselves, the trader statutes prohibit a tax which could be passed on to Indian retail customers, *i.e.*, consumers, and which would thereby impair the comprehensive regulation of the retail price structure which Congress has provided for those Indian consumers. *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965); *Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160 (1980). But neither the test of the trader statutes, nor their legislative history, nor the regulations promulgated under them, nor any court decisions dealing with them, evidence any similar concern for the Indian retailer as middleman, marketing a tax exemption to non-members.

The upshot is that essentially the same process of analysis and balancing of interests that the Court has already utilized in *Moe* and its progeny should also be the process used here. For that reason, the outcome should be the same as well.

Otherwise, the absurdities produced by the flawed and confused preemption analysis utilized by the Court of Appeals will persist. In *Moe* and its later cases, this Court has already authorized the states to require the Indian middleman to collect the taxes imposed on the non-member consumer. New York State has reduced even this burden on the middleman, by moving the collection obligation back one step in the distribution chain, from the middleman to the supplier. Yet the Court of Appeals, in its alternative holding, has determined that a burden found by this Court to be "minimal," and thus permissible when placed upon the Indian middleman, becomes "substantial" and thus impermissible when placed upon the non-Indian supplier. Proper preemption analysis produces no such absurdity.

ARGUMENT

STATE REGULATIONS, WHICH ARE DESIGNED TO INSURE COLLECTION OF TAXES FROM NON-TRIBAL MEMBERS AND REASONABLY ACCOMMODATE STATE AND TRIBAL INTERESTS, DO NOT IMPINGE UPON INTERESTS PROTECTED BY THE INDIAN TRADER STATUTES AND ARE NOT PREEMPTED THEREBY.

A. New York's Cigarette Tax System For Reservation Sales to Non-Members is Fully Consistent With The Regulatory Authority Allowed The States Under This Court's Decisions.

Prior decisions of this Court confirming the right of states to impose taxes on certain kinds of commercial transactions conducted on Indian reservations by non-members

have accorded the states the related right to take reasonable collection actions which do not unnecessarily intrude on core tribal interests. *Colville*, 447 U.S. at 162. The Court's prior holdings clearly sanction—if they did not expressly pass upon—the regulatory approach taken by New York as a balanced accommodation of state and tribal interests. Nevertheless, the Court of Appeals' characterization of New York's regulations on off-reservation cigarette suppliers (wholesalers or distributors) as significantly burdensome provides further reason for the Court to revisit once more the issue of permissible state regulatory activity which seeks to avoid widespread evasion of the tax obligation of non-member cigarette purchasers.[8]

The imposition of the tax collection obligation on the Indian reservation retailer by the state was upheld in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976), against the charge of gross interference with the tribes' freedom from state regulation. *Id.* at 482. Subsequent cases focused upon the mechanisms that the state may properly use to enforce that collection obligation. Thus, *Colville*, the first of these cases, endorsed Washington's requirement that reservation smokeshop operators affix tax stamps to cigarette packages as evidence of payment of the tax prior to their sale to non-members. The obligation thus entailed prepayment of the tax to the state by the tribal retailer.[9] The Court affirmed in *Colville* the right of a state to impose "detailed" record-keeping requirements on the retailer to distinguish between nontaxable sales to Indians

[8]The decision below first holds that the Indian trader statutes foreclose any regulation of suppliers. Pet.App. 7. However, as an anchor to windward, the Court of Appeals proceeds to find New York's regulations infirm because of their significantly burdensome nature. Pet.App. 11.

[9]While not specifically addressed by the Court in *Moe*, Montana's law, in fact, required prepayment of the tax by the retailer to its distributor, who then remitted the tax to the state. *See Confederated Salish & Kootenai Tribes, Mont. v. Moe*, 392 F. Supp. 1297, 1308 (D. Mont. 1975).

and taxable transactions with non-members. 447 U.S. at 160. Off-reservation cigarette seizures by the state were approved by the Court as an adjunct to the on-reservation compliance program. *Colville*, 447 U.S. at 161-62.

The Court has more recently returned to the issue of the appropriate enforcement mechanisms. In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), the Court identified enforcement options available to the states when it reaffirmed their right to look to the tribes and their officials for assistance in the collection of taxes. Recourse to damage actions against tribal officers or agents and to assessments against cigarette suppliers are highlighted and approved in the decision. *Id.* at 514.

It should be noted that in none of these decisions did the Court have occasion to consider the ability of the states to apply on the reservation the whole range of enforcement measures that would logically attend the collection and record-keeping requirements for reservation operators approved in *Moe* and *Colville*. These additional compliance activities, which are an integral part of any state's off-reservation tax collection program, include registration, periodic or special audits of taxpayer records, filing of returns and other information, subpoenas and their enforcement for the production of records when necessary, and collection through levies or seizures of taxpayer assets.[10]

In the aftermath of *Moe*, *Colville*, and *Potawatomi* and in the absence of instruction from the Court about the full scope of enforcement alternatives, states like New York which sought to actively address contraband cigarette traffic in Indian country consciously considered and chose between two primary compliance policies. The first would incorporate measures directly related to the approved right

[10]In *Colville* the Court expressly reserved the question of a state's right to conduct on-reservation seizures of cigarettes to enforce the tax obligations. 447 U.S. at 162.

of a state to look to Indian retailers for tax collection and record-keeping. A continuing audit and supplemental collection process, contemplated by this option, is direct, traditional, and provides administrative efficiencies. The policy would also mean a pronounced state presence in Indian country. Its implementation might spawn extended litigation and serve to exacerbate problems in the state-tribal relationship.

The second alternative, supported by *Moe*, *Colville*, and *Potawatomi*, emphasizes off-reservation compliance measures and activities, imposing only acceptable burdens on reservation retailers consistent with this Court's decisions. As a policy choice for a state, the merits and demerits of this alternative are the mirror image of the first option. Advantages lie in lowering state-tribal tensions and reducing litigation over state regulatory prerogatives. Conversely, an off-reservation enforcement emphasis, marrying innovative and traditional compliance mechanisms, would likely lead to inefficiencies and leakage in untaxed sales in the face of committed contraband activities on the reservation.[11]

New York has obviously elected the second regulatory alternative. The validity of the features of its program is an issue of intense interest to the *amici* states which must similarly police against deliberate evasion of its taxes not only in the area of cigarette transactions but in respect to other consumer sales, notably motor vehicle fuel purchases.

The underlying objectives of New York's off-reservation enforcement emphasis are to maximize taxation of cigarettes destined for resale to non-members while ensuring fully an available supply of the untaxed tobacco product for tribal member consumption. The requirement of prepayment of a tax from licensed wholesalers or distributors of products such as cigarettes or motor vehicle fuel has been a traditional, nondiscriminatory collection mechanism utilized by states through the years. Payment of the tax by such persons, because of a statutory prepayment obligation upon suppliers, was an integral part of the Montana and Washington tax systems approved for application to reservation transactions in *Moe* and *Colville*.[12]

The prepayment requirement imposed on the off-reservation supplier, of course, moves the payment of the tax one step back in the chain of distribution, *i.e.,* away from the reservation seller upon whom the obligation to affix stamps and prepay the tax was authorized in *Moe* and *Colville*. In this respect, the burden on the reservation retailer is actually lessened.

The other central feature in New York's regulatory system is the provision which monitors the legitimate traffic of unstamped, *i.e.,* untaxed, cigarettes to the reservations for sale to tribal members. Sufficient quantities are ensured by a flexible set of rules which liberally allow for an aggregate amount that is the product of tribal membership and statistical per capita consumption, with leave given to sellers to demonstrate a larger market for tribal member consump-

[11]A greater state presence on the reservation, represented by the first enforcement option, would tend to lessen the incidence of contraband activity. Conservatively estimated, the state of Washington, whose compliance system parallels New York's, loses $8.9 million in tax revenues annually from such activity. REPORT OF THE LEGISLATIVE BUDGET COMMITTEE TO THE WASHINGTON LEGISLATURE, CIGARETTE TAX STUDY 1, 4 (1990).

[12]Where unstamped cigarettes may permissibly be transported or possessed within the state, as, for example, when a reservation merchant might choose to transact business with an out-of-state supplier, state law will likely require record-keeping and other arrangements for payment of the tax. See Pet.App. A11. *See also, e.g.,* Wash. Rev. Code § 82.24.250. Off-reservation seizures pursuant to applicable state law will occur when persons in possession of unstamped cigarettes choose not to comply with these requirements or when there is evidence of "wholesale evasion" of the state tax. *See Colville,* 447 U.S. at 162.

tain exemption certificates from their wholesale or retail customers on the reservations and to maintain accurate records of such transactions are rational adjuncts to the basic mechanism that insures the legitimate movement to the reservations of cigarettes which should properly be sold untaxed.[13] The traffic is regulated in a manner which does not intrude upon core tribal interests.

In summary, New York's law, which seeks to minimize the loss of taxes attributable to reservation cigarette sales to non-member purchasers by accommodating the relevant reservation interest of tribal sovereignty and the state's own concerns by an emphasis on off-reservation compliance. While New York's regulations represent a variation on the tax enforcement systems directly considered in *Moe* and *Colville*, their features fall clearly within the minimum burden limitations outlined by the Court, insofar as reservation interests are affected.[14]

However, the Court of Appeals concludes, rather paradoxically, that the requirements imposed on off-reservation persons, however they might lessen the burden on reservation sellers which are otherwise permissible under this Court's decisions, are preempted by federal law. We turn now to this contention.

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[13]This type of obligation is neither onerous nor unfamiliar. Under federal law cigarette distributors must file periodic returns with the states, reporting untaxed cigarettes sold and delivered into another jurisdiction. *See* 15 U.S.C. § 376.

[14]New York's rules also allow for the tribes to grant or withhold approval for the quantities of untaxed cigarettes that a supplier seeks to distribute to qualified sellers. Pet.App. 13. It should be further noted that the thrust of the State's regulations applied to off-reservation suppliers would have the propensity for reducing the need for detailed record-keeping by Indian retailers, the minimum burden contemplated by *Moe* and *Colville*.

B. Neither the Off-Reservation Nor On-Reservation Provisions of New York's Law Touch Upon the Interests that are the Concern of the Indian Trader Statutes (25 U.S.C. §§ 261-264) so as to Warrant Their Preemption by Federal Law.

There is much in the trilogy of *Moe*, *Colville*, and *Potawatomi* to support the conclusion that the Court has already held that regulatory schemes, like those of New York, are not preempted by the Indian trader statutes. 25 U.S.C. §§ 261-264.

The Court of Appeals acknowledges the existence of that support in its alternative holding which seeks to distinguish this Court's earlier decisions. Thus, New York's regulations are found to place "significant" burdens on off-reservation suppliers as Indian traders, whereas the regulatory systems earlier in issue before this Court presumably did not.[15] The opinion of the Court of Appeals is devoid of any discussion regarding the comparison of these obligations on suppliers with the *minimum* burdens on Indian retailers approved by this Court. Pet.App. A11-12.

In its opinion the Court of Appeals observes that "*Moe* and *Colville* involved burdens placed on Indian retailers dealing with non-Indians, rather than on wholesalers dealing with Indians, a significant difference . . ." Pet.App. A8. The court appears unaware that the Indian retailers in *Colville*, subject to state regulation, were themselves licensed Indian dealers. *See Confederated Tribes of Colville v. State of Wash.*, 446 F. Supp. 1339, 1347 (E.D. Wash. 1978).

Similarly, Montana's regulations at issue in *Moe* required suppliers to prepay the cigarette excise tax. *See supra n.9.* Most important perhaps is the Court's approval, first in *Colville* and more recently in *Potawatomi*, of off-res-

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[15]The position taken by the New York court, previously expressed in its earlier decisions, holds that the Indian trader statutes do not allow regulation of traders for any purpose. Pet.App. A7.

ervation seizures of suppliers' cigarette shipments. Those suppliers would be regarded as Indian traders for purposes of the federal statute under this Court's decision in *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980). The regulatory impact of seizure transcends in significance any of the other burdens which New York has placed on suppliers and which the Court of Appeals considered as fatal under the federal statute. For whatever reason, the decision below fails to note any of these considerations.

There is thus ample evidence that the Court, by clear implication if not expressly, has already permitted the operation of state law directly upon Indian traders, notwithstanding the broad preemptive language employed by the Court in another context in *Warren Trading Post*, 380 U.S. 685.[16] The position is sound and is additionally supported by underlying considerations which inhere in the Indian trader statutes themselves.

Each of the cases in which this and other courts have found preemption of state tax laws because of the Indian trader statutes presents a situation where the economic burden of the tax imposed on the Indian trader was passed on to the tribal member. *Warren Trading Post*, 380 U.S. 685; *Central Machinery*, 448 U.S. 160; *New Mexico Taxation & Revenue Dep't v. Laguna Indus., Inc.*, 855 P.2d 127 (N.M. 1993).[17] By increasing the cost of the goods and services

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[16]The fact patterns underlying the decisions in *Moe* and *Colville* thus justify and explain the earlier remand of the instant case for reconsideration.

[17]The holding of the state court in the last of these decisions, applying the statutes to the provision of services, represents a questionable extension of the law, given the plain language of 25 U.S.C. § 261 which provides:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of *goods* and the prices at which such *goods* shall be sold to the Indians. (Emphasis added).

sold to the Indians, these state tax provisions were inconsistent with the provisions of the Indian trader statutes preserving to the Commissioner of Indian Affairs the power to set the price of goods sold to Indians. The vice of these state laws, however, was the burden imposed on the Indians, not the burden imposed on the Indian trader.

The New York tax regulations at issue herein are carefully tailored to avoid imposing any tax burden on tribal members. The only passed-on economic burden of the tax is that which is borne by the non-members retail purchaser. This Court in *Moe*, *Colville*, and *Potawatomi* has already authorized state tax systems that require the Indian retailer to collect tax from the non-member purchaser.

In short, the core concern of the federal law is the protection of the ultimate tribal member customer (as the trader's purchasers or sellers) on the reservation from "fraud and imposition." *Central Machinery*, 448 U.S. at 163. Must the federal law, however, be considered to foreclose the operation of state law upon transactions of the nature now under review when the ultimate purchasers are non-members and the tribal presence is represented by a retailing intermediary? The Court has, of course, impliedly rejected this notion in *Colville*, 447 U.S. at 155-56 ("The Indian trader statutes . . . incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange . . ., but no similar intent is evident with respect to sales by Indians to non-members of the Tribe.") (Citations omitted).

Absent some persuasive identification of a tribal interest that is at risk through New York's regulations, it would be anomalous to conclude that a state's right to protect itself against a reservation-marketed tax exemption (*Colville*, 447 U.S. at 155) is nonetheless circumscribed by concepts of reservation immunity whether expressed as a function of

tribal sovereignty or general federal preemption.[18] The latter principle is not to be applied uncritically as the Court has only recently admonished. *Cotton Petroleum*, 490 U.S. at 176 ("We have applied a flexible preemption analysis sensitive to the particular facts and legislation involved. Each case requires a particularized examination of the relevant state, federal and tribal interest.")

Relevant to a flexible preemption analysis is the historical fact that the present Indian trader statutes had their origins in the beginning of the nation and their precursors were conceived for a period when reservations were to be treated as isolated and separated from the states within whose boundaries they might be found.[19] Ingress and control over commercial relations within the reservation were to be the province of the federal government to insure against the exploitation of the reservation residents. The

[18]The Court of Appeals merely speculates that New York's regulations might disrupt Congress' statutory plan to prohibit unfair or unreasonable prices. Pet.App. A12. The opinion points to the cigarette tax prepayment by the Indian trader supplier as the kind of disruptive financial burden the federal statute was intended to protect against.

[19]The earliest Indian trader licensing laws enacted by Congress are chronicled in *Central Machinery*, 448 U.S. at 160. The language found in the principal provision of current law (25 U.S.C. § 261) which assigns to the Commissioner of Indian Affairs authority over "appointment" of traders and for the regulation of goods and their prices was first contained in the Act of August 15, 1876, 19 Stat. 200.

Indians' sale of goods indigenous to the reservation or its way of life were also the focus of the trading statutes.[20]

The present day reality reflects the non-member's increased access to the reservation, at times at the invitation of its tribal residents and, as this Court's cigarette tax case decisions from *Moe* to the instant case amply document, with the enticement of avoiding a tax obligation that would be otherwise owing. The concept of a congressional intent to establish reservations as tax havens for non-members cannot be gleaned from the trading statutes either in their evolution or their present day context.

The Indian trader statutes, in general language, direct the federal government to authorize trade with reservation Indians only under such rules and regulations as may be prescribed "for the protection of [reservation] Indians." 25 U.S.C. § 262. If there were some immunity to be derived by the Indian trader which acts as a supplier to tribal retailers who, in turn, sell to non-members, one might expect to find some suggestion of this tribal interest in the regulations adopted under the statute. 25 C.F.R. part 140. There is not a hint of such a concern in the generally stated rules or other indication that the thrust of the regulatory requirements is other than the historical focus, that of protecting the

[20]Of particular interest is an earlier provision in the Indian trader statutes, first enacted in 1834 and repealed in 1953, which was directed at activities of non-tribal purchasers on the reservation and provided:

> Every person, other than an Indian, who, within the Indian country, purchases or receives of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any article of clothing, except skins or furs, shall be liable to a penalty of fifty dollars.

R.S. § 2135. Beyond the fact of its absence from current law, this prior prohibitory provision was in no way directed at products imported into Indian country for resale to non-Indians—with the exception of the improvident sale of specified items for the Indians' subsistence.

Indian with whom the licensed trader is ultimately dealing.[21] Acknowledging the opening of the reservations for commercial dealings with non-members and the implication of state interests because of those dealings, the modern decisions reject the assertion that state regulation is perforce precluded on the reservation or preempted where there is a federal statute in place particularly addressing Indian concerns.[22] The particularized examination of federal, state, and tribal interests which the Court (*e.g.*, *Cotton Petroleum*, 490 U.S. at 176-77) holds must attend the issue of preemption leads inevitably to the conclusion that state tax regulation of transactions of non-members on the reservation is not foreclosed.

What remains to be considered is the alternative holding of the Court of Appeals that the regulations adopted by New York are preempted because they represent a *substantial* burden on the Indian trader *suppliers*. Pet.App. A11. Central to the court's construct is its shift of this Court's inquiry in *Moe* and *Colville* into the nature of this burden on tribal retailers to an analysis of the obligation placed upon suppliers.

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[21]The vigilance of the Bureau of Indian Affairs in adopting rules to carry out this mandate or even in enforcing existing regulations has been brought into question in the past. *See Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971) (Language in Indian trader statutes authorizing Commissioner of Indian Affairs to adopt regulations "as he may deem just and proper" does not immunize from judicial review failure to adopt and enforce rules on the Navajo Reservation). *See also, U.S. ex rel. Keith v. Sioux Nation Shopping Center*, 488 F. Supp. 496 (D. S.D. 1980), *aff'd*, 634 F.2d 401 (8th Cir. 1980) (Non-Indian deemed to be in substantial compliance with Indian trader statutes by obtaining tribal permit where licenses were "almost" impossible to obtain from federal agency).

[22]*Cf. United States v. McGowan*, 302 U.S. 535, 539 (1938) ("enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the [reservation] of such state laws as conflict with the federal enactments.")

In the progression from *Moe* through *Colville* this Court found plainly acceptable a tax collection requirement (and accompanying prepayment obligation) on tribal retailers. The same approbation was given to the "detailed" record-keeping requirement for retailers to delineate taxable and non-taxable sales. *Colville*, 447 U.S. at 159-60. As we have earlier demonstrated, New York's regulations shift the prepayment obligation to the supplier; record-keeping obligations on the suppliers have the same objective of distinguishing between taxed and untaxed transactions.

The opinion of the Court of Appeals fails altogether to explain how this transfer of obligation from tribal retailers to the respondent suppliers necessitates invalidating the New York approach.[23] It is protection of tribal members, not non-members, from exploitation which is the concern of the Indian trader statutes. If there is no transgression upon that concern in the setting of *Moe* and *Colville*, there should be none in the present context either. It would indeed be anomalous to restrain the state authority to a greater degree when a non-tribal, non-reservation entity bears the challenged regulatory burden than when a tribal, reservation-based person does. For these reasons, the position of the Court of Appeals is unsupportable even when its own test is applied.

The ramifications of the decision of the Court of Appeals are extremely serious for the states. They have been earlier identified. Increased incidence of contraband activity and tax evasion on the reservation in the future is a cer-

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[23]The opinion reads too narrowly the decision in *Potawatomi*, which sanctions the right of states to assess suppliers for the cigarette tax, by concluding that assessments can be made only *after* the sale of unstamped cigarettes to tribal retailers. Even if this constricted reading is followed, a supplier would be no less likely to take its ultimate obligation for payment of the tax into its calculation of the price to be charged to the retailer. Pet.App. A10-11. The financial burden of the tax, which the Court of Appeals found unacceptable, would remain.

tainty as the principle of the decision below is extended to marketable commodities other than cigarettes and the states are denied the right to regulate the Indian trader when sales are made to non-members. Increased surveillance and compliance efforts are similarly inevitable, occasioning expenditures which should be unnecessary.[24] Further litigation can be predicted as the states pursue other allowable enforcement options on the reservation.

There is one final consideration, appropriate for mention. Consistent with the Court's suggestion in *Potawatomi*, a number of states and tribes have sought, with some success, to negotiate compacts for the collection and distribution of cigarette taxes. It may fairly be inferred that these agreements were reached as the parties evaluated what is the law under *Moe* and later decisions of this Court. Other negotiations in the area of cigarette taxes and motor vehicle fuel are continuing. This case, therefore, presents the opportunity for the Court to impart certainty and accuracy on an important issue of regulatory jurisdiction, thus allowing tribes and states alike to assess rights and responsibilities to be brought to their continuing relationship.

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[24]Prohibitions on state regulations which require suppliers to prepay the tax and maintain records of exempt and taxable sales would particularly aggravate the enforcement problem in the case of motor vehicle fuel sales. Unlike the situation with cigarettes which can be made to bear a tax stamp, there is no equivalent identifier for motor vehicle fuel. Thus, detecting the extent of contraband activity for this product would be rendered extremely difficult, if not impossible.

CONCLUSION

The judgment of the Court of Appeals for the State of New York should be reversed.

Respectfully submitted,

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